

REGULATING PESTICIDE USE ON CANNABIS

MAY 15, 2017

ISSUE

Develop EPA's position regarding appropriate pesticide use for cannabis² and related state requests.

BACKGROUND

- Many states have legalized cannabis for medical and recreational use, yet cannabis remains a schedule I controlled substance under federal law.
- There are no pesticides registered by EPA specifically for use on marijuana; however, some pesticide labels do list industrial hemp among the crops. The lack of registered pesticides for use on cannabis poses pest control challenges and potential and unknown human health concerns where pesticides are illegally used on cannabis plants that are later inhaled, applied dermally and/or ingested. Human health risk assessments, including dietary and occupational assessments, required to register pesticides have not been conducted for cannabis.
- Registered pesticide products, however, that have broad label language (i.e., "may be used on bedding plants") potentially may be used on cannabis depending on the specific product and label. Also, pesticides that are exempt from registration requirements can be used on cannabis without violating FIFRA.
- Some states have passed legislation which directly (identify specific pesticides) or indirectly (setting tolerances for pesticides) allows the use of pesticides on cannabis within their state, in a manner that is inconsistent with FIFRA. The use of certain pesticides on cannabis is a violation of FIFRA. However, most states have primary enforcement responsibility (primacy) for pesticide use violations as long as the state pesticide use laws are consistent with FIFRA.
- The Office of Pesticide Programs (OPP) is responsible for the registration of pesticides and the Office of Enforcement and Compliance Assurance (OECA) oversees the cooperative agreement program that confers primacy to the states for pesticide use.

² For the purposes of this document, the Agency is using the following draft definitions.

Cannabis: Plants in the genus Cannabis that are grown for production purposes. Includes both "marijuana" and "hemp" as defined below. Both forms are controlled substances under the Controlled Substances Act.

Marijuana: Cannabis plants (Cannabis sativa L. or Cannabis indica) and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol [THC] concentration of more than 0.3 percent on a dry weight basis.

Hemp: The plant Cannabis sativa L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis. Also referred to as "industrial hemp." USDA further defines industrial hemp as "including seeds of such plant, whether growing or not, that is used exclusively for industrial purposes (fiber and seed)" and defines tetrahydrocannabinols as "all isomers, acids, salts, and salts of isomers of tetrahydrocannabinols" (Federal Register, Vol. 81, No. 156, page 53395-53396).

- OPP, OECA, OGC, and the Regions have worked together on issues pertaining to the regulation of pesticide use on cannabis.
 - OPP and OGC have taken the position that FIFRA Section 24(c) (Special Local Needs) could be used to authorize pesticide use on cannabis on a case-by-case basis.
 - OECA has not yet taken a position on any state laws pertaining to pesticide use on cannabis, the effect on a state's primacy, nor how EPA would respond to any identified violations.
- As the number of states and tribes who have legalized medical and/or recreational cannabis grows, the need is growing for the agency to take positions on the use of pesticides on cannabis:
 - Cannabis growers have significant issues with pests, most notably spider mites, aphids, and powdery mildew and other molds. Unregistered pesticides in cannabis production are used to improve yield and profits for growers. Illegal residues of insecticides/miticides and fungicides have been found on cannabis being grown for both medical and recreational uses. These pesticides have unknown health consequences when used on cannabis, and may pose serious risks to public health.
 - Recently, OPP received applications for "special local needs" registrations from three states: Nevada, Vermont, and Washington.
 - Each states issued four 24(c) registrations on April 4, 2017
 - States have been inquiring about whether additional products could be considered under FIFRA 24(c).
 - Recently, there had been pending Colorado state legislation, which would have allowed the use of certain pesticides on marijuana in Colorado despite there being no pesticides currently registered by EPA, potentially at odds with FIFRA and state primacy requirements.

LEGAL ANALYSIS

- FIFRA Section 12(a)(2)(G) makes it unlawful to use any registered pesticide in a manner inconsistent with its labeling. EPA has not registered any pesticide specifically for use on marijuana and, consequently, there are no registered pesticides bearing labels that specifically authorize use on marijuana. Therefore, use of a registered pesticide on marijuana may be a violation of FIFRA.
- The 2014 federal Farm Bill, codified at 7 U.S.C. section 5940, allows for production of industrial hemp if 1) the industrial hemp is grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research; and 2) it is allowed under state law. The term "industrial hemp" does not preclude food uses of hemp.

- FIFRA permits individual states that have unique or unusual pest management challenges to pursue a pesticide registration in their state when a national registration may not be necessary or appropriate. States are permitted to register an additional use of a pesticide that is already registered for another use as [HYPERLINK "https://www.epa.gov/pesticide-registration/pesticide-registration-manual-chapter-17-state-regulatory-authority"].
- Most states, including Colorado, have cooperative agreements with EPA and primacy to enforce pesticide use violations. There are, however, statutory and regulatory requirements that must be met in order for EPA to confer primacy:
 - Where primacy is obtained via: (1) an EPA primacy determination; or (2) an approved certification program, FIFRA requires that states must have adequate pesticide use laws/regulations and adequate procedures implementing those laws (FIFRA Section 26(a) and (b)).
 - Where primacy is obtained via a cooperative agreement, the adequacy criteria are not expressly required by statute (FIFRA Section 26(b)). However, the Agency's Final Interpretive Rule (48 FR 404-411, January 5, 1983) requires EPA to conduct an evaluation using the adequacy criteria in Section 26(a) before conferring primacy via cooperative agreement.
- The Interpretive Rule sets forth that: "[s]tate pesticide control legislation will be considered adequate for purposes of assuming full primacy if State law prohibits those acts which are proscribed under FIFRA and which relate to pesticide use." Therefore, EPA may determine that a state law is inadequate where it is inconsistent with FIFRA as it relates to pesticide use.
- There are two options when inadequacies are identified

Deliberative Process / Ex. 5

ACTION ITEMS AND RECOMMENDATIONS

1. Special Local Needs Options:

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Recommended Option:

Commented [ZN1]: TBD; briefing for OD next week

2. Primacy issue Options:

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